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ATTORNEY FOR APPELLANT:

MICHAEL E. HUNT
Chief Public Defender
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MISTY R. EVANS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 53A01-0609-CR-389
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No.53C02-0411-FC-937

December 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Misty Evans was convicted of leaving the scene of an accident, a Class C felony, and sentenced to eight years at the Indiana Department of Correction. Evans appeals her conviction and sentence, raising several issues of which we find the following dispositive: whether she received ineffective assistance of trial counsel. Concluding that Evans has proved deficient performance and resulting prejudice as a result of her trial counsel's failure to object to the trial court's instruction which included less than all of the essential elements of the offense, we reverse and remand.

Facts and Procedural History

As Evans, a bartender at the Eagles Lodge in Bloomington, finished her November 5, 2004, shift at approximately 10:00 p.m., George and Linda Price entered the Lodge and invited Evans to go with them to another local bar. Evans, accompanied by Kenny Siedl, another patron of the Eagles Lodge, drove to the bar and met the Prices there sometime after 11:00 p.m. She ordered four or five beers while there, but two were spilled. At approximately 2:00 a.m., the party left the bar and Evans drove Siedl to his home before heading home herself. As Evans traveled on Rockport Road toward home, she hit what she thought was a deer, causing the airbags in her car to deploy. Evans stopped the car and stood between the open driver's side door and the car to look over the front and back of the car for the deer. Seeing nothing, Evans returned to her car and drove home.

At approximately 4:00 a.m., police called to Rockport Road found the body of Jesse Reuben Jacobs in the roadway. Later in the day, a gentleman who was aware of the situation noticed a black car in a driveway with a shattered windshield and alerted a police officer who

was patrolling the nearby area. The car was ultimately traced to Evans and forensic tests linked the car to Jacobs and the accident scene.

Evans was charged with reckless driving and leaving the scene of an accident causing death, both Class C felonies. A jury found Evans not guilty of reckless homicide but guilty of leaving the scene of an accident. Evans was sentenced to an enhanced term of eight years at the Indiana Department of Correction. Evans now appeals her conviction and sentence.

Discussion and Decision

Evans contends that her trial counsel was ineffective for failing to object to the trial court's erroneous instruction defining the elements of the crime of leaving the scene of an accident or to tender an alternate instruction.

I. Standard of Review

We review ineffective assistance of trial counsel claims under the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). First, the appellant must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness and denied her the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). We presume that counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. Id. "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id.

Second, the appellant must demonstrate that she was prejudiced by her counsel's

deficient performance. Wentz, 766 N.E.2d at 360. To demonstrate prejudice, an appellant must demonstrate a reasonable probability that the result of her trial would have been different if her counsel had not made the errors. Id. A probability is reasonable if our confidence in the outcome has been undermined. Id. If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. Id.

II. Jury Instruction

We first examine the preliminary instructions that the trial court read to the jury:

Count II alleges in pertinent part: On or about November 6th, 2004, in Monroe County, Indiana, the defendant, being the driver of a vehicle, involved in an accident that resulted in the death of Jesse R. Jacobs, failed to remain at the scene of the accident until she had provided her name and address, rendered reasonable assistant [sic] to the injured, and she failed to notify the police by the quickest possible means. This is in violation of Indiana Code 9-26-1-1. That section of Indiana code, 9-26-1-1, in relevant part provides: The driver of a vehicle involved in an accident that results in the death of a person shall do the following: Immediately stop the vehicle at the scene of the accident or as close to the accident as possible, in a manner that does not obstruct traffic more than is necessary. Immediately return to and remain at the scene of the accident until the driver does the following: Gives the driver's name and address. Renders reasonable assistant [sic] to each person injured in the accident and immediately gives notice of the accident by the quickest means of communication to the office of the County Sheriff if the accident occurs outside a municipality. A person who fails to stop or comply with the requirements of this law commits a class C felony if the accident involves the death of a person. Therefore, in order for you to convict the Defendant of the criminal offense of leaving the scene of an accident as a class C felony, you must find beyond a reasonable doubt that on or about November 6th, 2004, in Monroe County, Indiana, the Defendant, Misty Evans, being the driver of a vehicle involved in an accident that resulted in the death of Jesse R. Jacobs, failed to remain at the scene of the accident until she had provided her name and address and rendered reasonable assistance to the injured and failed to notify the County Sheriff by the quickest possible means. Pleas of not guilty have been entered and the burden rests upon the State of Indiana to prove to

each of you beyond a reasonable doubt every essential element of the crimes charged.

Transcript at 4-6. The final instruction is virtually identical to the preliminary instruction, again instructing the jury:

[I]n order for you to convict the Defendant of the criminal offense of Leaving the Scene of an Accident, as a class C felony, you must find, beyond a reasonable doubt, that on or about November 6th, 2004, in Monroe County, Indiana, the Defendant, Misty Evans, being the driver of a vehicle involved in an accident that resulted in the death of Jesse R. Jacobs, failed to remain at the scene of the accident until she had provided her name and address and render[ed] reasonable assistance to the injured, and failed to notify the County Sheriff by the quickest possible means.

Id. at 434-35.

Generally, to succeed on a claim that trial counsel was ineffective for failing to make an objection, the appellant must demonstrate “prejudicial failure to raise an objection that the trial court would have been required to sustain.” Stephenson v. State, 864 N.E.2d 1022, 1035 (Ind. 2007).

In Micinski v. State, 487 N.E.2d 150, 152-53 (Ind. 1986), our supreme court considered the predecessor to Indiana Code section 9-26-1-8 and held “that knowledge of the fact that an injury accident has occurred is a necessary element of the proof” This remains the case under Indiana Code section 9-26-1-8. See State v. Gradison, 758 N.E.2d 1008, 1011 (Ind. Ct. App. 2001). Evans contends, and the State concedes, that the trial court’s instruction was erroneous for failing to include the mens rea element.

Our supreme court has previously held that it is fundamental error for a trial court to fail to give an instruction setting forth all the elements of the offense. Lacy v. State, 438

N.E.2d 968, 971 (Ind. 1982); see also Screws v. United States, 325 U.S. 91, 107 (1945) (finding fundamental error where the jury instructions did not sufficiently set forth the mens rea element of the charged offense). If Evans's trial counsel had made an objection to the trial court's instruction, then the trial court would have had to sustain it because the mens rea element of the crime of which Evans was accused was not present in the instructions.¹ To do otherwise would have constituted error that would have had a prejudicial effect. See Stephenson, 864 N.E.2d at 1035. We therefore hold that Evans has established the first element of her ineffective assistance of counsel claim, in that her trial counsel's performance fell below an objective standard of reasonableness.

¹ The Indiana Pattern Jury Instruction for failure to act as required after an accident resulting in bodily injury states, in pertinent part:

A person who knows that he or she was involved in an accident causing injury to a person and who fails to comply with this duty imposed by law commits the crime of failure to act as required after an accident involving bodily injury, a Class A misdemeanor. . . . The offense is a Class C felony if the accident involves the death of a person.

To convict the Defendant, the State must have proved each of the following elements:

The Defendant

1. was the driver of a vehicle involved in an accident that resulted in the injury of (name person alleged), a person, and
2. knew that an accident had occurred involving (his) (her) vehicle and
3. knew that the accident had resulted in injury to a person, and
4. (a) did not immediately stop the vehicle at the scene of the accident or as close to the accident as possible, or
(b) did not immediately return to and remain at the scene of the accident until (he) (she) had:
 - (1) given (his) (her) name and address and the registration number of the vehicle (he) (she) had been driving, and
 - (2) upon request, exhibited (his) (her) driver's license to the person struck and the driver or occupant of or person attending each vehicle involved in the accident, and
 - (3) determined the need for and rendered reasonable assistance to each person injured in the accident, including the removal or the making of arrangements for the removal of each injured person to a physician or hospital for medical treatment.

Ind. Pattern Jury Instruction No. 7-101 (1997).

Evans must also show that her trial counsel's deficient performance resulted in prejudice to her; that is, there is a reasonable probability that the result of her trial would have been different. That knowledge of the fact that an injury accident has occurred is an essential element of a prosecution under Indiana Code section 9-26-1-8 does not mean that the State must prove actual knowledge of an injury accident in order to obtain a conviction. Micinski, 487 N.E.2d at 153. "Where conditions were such that the driver should have known that an accident occurred or should have reasonably anticipated that the accident resulted in injury to a person, the requisite proof of knowledge is present." Id.

The State argues that the instructional error was harmless because Evans cannot and did not contest her knowledge of the accident. We have held that error in instructing the jury is harmless when a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise, Smith v. State, 755 N.E.2d 1150, 1152 (Ind. Ct. App. 2001), trans. denied; however, we are less inclined to find harmless error where the instruction covers something as vital as the essential elements of proof and it appears the jury's verdict might have been based on the instruction at issue or where the trial court's action leaves the jury in doubt as to the law, see Micinski, 487 N.E.2d at 153. Had the jury been properly instructed, it would have been required to find that the State proved not only Evans's knowledge of an accident, but also her knowledge, actual or imputed, that the accident resulted in injury to a person in order to convict her of leaving the scene of an accident. Evans's defense at trial was that she thought she had hit a deer, a defense which goes to the very heart of the mens rea element. We express no opinion about the credibility of that

defense; credibility is an issue for the jury. See Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (“It is the fact-finder’s role, not that of appellate courts, to assess witness credibility”).

Because of the faulty instruction, however, the jury may not have properly assessed the credibility of Evans’s defense.² We believe there is a reasonable probability that had trial counsel objected to the instruction and tendered an alternate instruction outlining all of the essential elements required to find Evans guilty of leaving the scene of an accident, the jury’s verdict would have been different. As such, trial counsel’s failure was not harmless and Evans was prejudiced by his deficient performance.

As our supreme court held in Robinette v. State, 741 N.E.2d 1162, 1168 (Ind. 2001), double jeopardy does not bar retrial when there is sufficient evidence to support a conviction.

In this case, there is no dispute that Evans knew she was involved in an accident and the forensic evidence is sufficient to link her car to Jacobs. Accordingly, our reversal of Evans’s conviction does not preclude her retrial.

Conclusion

Evans’s counsel rendered deficient performance in failing to object to the trial court’s instruction on the elements of the crime of leaving the scene of an accident and Evans was prejudiced thereby. We reverse Evans’s conviction on that basis and remand for further proceedings consistent with this opinion.

Reversed and remanded.

² The trial court’s instruction basically makes the offense one of strict liability, requiring the jury to find only that there was an accident, that it caused Jacobs’s death, and that Evans had failed to remain on the scene.

KIRSCH, J., and BARNES, J., concur.